BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

BARBARA SOLIS	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,019,955
STANDARD MOTOR PRODUCTS	)	
Respondent	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY COMPANY	)	
OF AMERICA	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier appealed the August 21, 2006, Award entered by Special Administrative Law Judge Marvin Appling. The Workers Compensation Board heard oral argument on November 28, 2006.

APPEARANCES

William L. Phalen of Pittsburg, Kansas, appeared for claimant. Brian R. Collignon of Wichita, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for bilateral upper extremity injuries claimant allegedly sustained in a series of repetitive traumas while working for respondent from September 12, 2003, through June 25, 2004. In the August 21, 2006, Award, Judge Appling awarded claimant benefits under K.S.A. 44-510e for a 74 percent permanent partial general disability, which was based upon a 48 percent task loss and a 100 percent wage loss.

Respondent and its insurance carrier contend Judge Appling erred. They argue claimant is entitled to receive benefits under the schedules of K.S.A. 44-510d for a left wrist injury only. In the alternative, they argue claimant does not have a work disability (a permanent partial general disability greater than the whole person functional impairment rating) under K.S.A. 44-510e because she voluntarily left respondent's employ when respondent was able to accommodate her injury. Accordingly, respondent and its insurance carrier request the Board to modify the August 21, 2006, Award.

Conversely, claimant contends the Award should be affirmed.

The only issue before the Board on this appeal is the nature and extent of claimant's injury and disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the Award should be modified.

Respondent manufactures automobile parts. Claimant, who has an eighth grade education, assembled those parts. The job, which claimant performed for respondent and its predecessors beginning in October 1998, required the repetitive, forceful use of her fingers, hands and wrists.

In this claim, claimant alleges she injured both upper extremities in a series of traumas while assembling parts for respondent during the period from September 12, 2003, through June 25, 2004. But this was not the first time that claimant had experienced problems with her upper extremities. Claimant began receiving medical treatment in 2001 for tendinitis and carpal tunnel symptoms in her wrists. And in January 2002, claimant had right carpal tunnel release surgery.

Following the right wrist surgery, claimant returned to work for respondent as an assembler. And in July 2002, claimant entered into a settlement agreement with respondent in which she received workers compensation benefits for the right wrist injury.

Claimant alleges the symptoms in her upper extremities worsened after she resumed working for respondent. From September 2003 through June 2004, claimant assembled switches and solenoids. In September 2003, claimant reported to respondent that her symptoms were increasing. Claimant then began receiving additional medical treatment.

Eventually, in December 2003, claimant began treating with Dr. Kenneth W. Johnson, who initially diagnosed bilateral lateral and medial epicondylitis, mild bilateral

carpal tunnel syndrome and mild cubital tunnel syndrome. The doctor prescribed conservative treatment, which included medications, therapy and a steroid injection in claimant's right elbow. Nerve studies done during this period were normal and in May 2004 the doctor released claimant to return to work without restrictions.

Claimant testified that the pain in her hands worsened. She also testified she reported her problems to her supervisor but to no avail. According to claimant, she was scheduled to be laid off but she decided to take a voluntary layoff instead and receive some severance pay as she did not feel she could perform her job any longer due to the pain. Claimant further testified she told someone in human resources that she wanted to volunteer to take the layoff because of the pain in her hands, wrists, arms and her shoulder. Claimant's last day working for respondent was June 25, 2004.

Conversely, respondent's human resources manager, Krista Heimberger, testified claimant was advised she was not likely to be laid off but that she might be moved from first shift to second shift. When Ms. Heimberger testified in May 2006, respondent continued to employ 19 assemblers who had less seniority than claimant held when she left. In short, claimant would not have been laid off in June 2004 if she had not volunteered. Moreover, claimant opted for voluntary layoff on May 19, 2004, which was several days before she underwent her last nerve study and before Dr. Johnson made any final decisions about claimant's condition. Finally, Ms. Heimberger does not recall any conversation with claimant that she was leaving due to her pain.

Approximately one month after leaving respondent's employment, claimant and her husband moved to La Junta, Colorado, to be closer to family. In August 2004, after moving to Colorado claimant began a job search. Claimant testified she contacted four potential employers each week. And at the September 2005 regular hearing claimant introduced a calendar upon which she recorded the names and telephone numbers of the contacts that she had made during 2005.

Claimant testified she told prospective employers about her injuries and her restrictions and that there was never a time she did not disclose her restrictions when going to prospective employers. And claimant testified:

> Q. (Mr. Collignon) And did you happen to keep track of what position you were applying for in this book [claimant's exhibit 2 to the regular hearing transcript]?
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> A. (Claimant) It was usually cook, housekeeper, maid, that kind of stuff.
>
> Q. Okay, did you already know from [vocational expert] Ms. Terrill's report that those jobs included duties which were outside of your restrictions?

> A. This is why I would tell the person I was talking to, applying for the job that I had restrictions.
>
> Q. Okay, so you knew that you could not fulfill all the job duties when you applied, given your restrictions, right?
>
> A. Right.[1]

At the time of the regular hearing claimant remained unemployed but she had been notified only five days before that she had qualified for Social Security disability benefits.

1. What is claimant's functional impairment?

The record contains three expert medical opinions regarding the extent of claimant's functional impairment. Dr. Johnson, who saw claimant five times from December 2003 through May 2004, testified his final diagnoses were subclinical bilateral carpal tunnel syndrome (symptoms but normal nerve studies) and bilateral mild lateral and medial epicondylitis. The doctor did not believe claimant had any functional impairment as measured under the AMA *Guides*[2] (4th ed.). Dr. Johnson is board-certified in physical medicine and rehabilitation.

On the other hand, Dr. Edward J. Prostic testified that under the AMA *Guides* (4th ed.) claimant had a 15 percent impairment to the right upper extremity due to carpal tunnel syndrome and a 15 percent impairment to the left upper extremity due to carpal tunnel syndrome and de Quervain tendinitis. The doctor converted those ratings for a 17 percent impairment to the whole person. Dr. Prostic, who is a board-certified orthopedic surgeon, examined claimant in January 2005 at her attorney's request.

Dr. C. Reiff Brown, who is also a board-certified orthopedic surgeon, examined claimant in March 2005 at the request of Administrative Law Judge Thomas Klein. Dr. Brown concluded claimant had sustained multiple overuse syndromes to both upper extremities. Using the AMA *Guides* (4th ed.) where applicable, Dr. Brown rated claimant as having (1) a four percent impairment to the left upper extremity due to mild rotator cuff tendinitis, (2) a one percent impairment to each upper extremity due to bilateral lateral epicondylitis, (3) a one percent impairment to each upper extremity due to bilateral medial epicondylitis, and (4) a five percent impairment to each upper extremity due to bilateral residual carpal tunnel syndrome symptoms. According to Dr. Brown, those ratings convert

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[1] R.H. Trans. at 46, 47.

[2] American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

to an 11 percent impairment to the left upper extremity and a seven percent impairment to the right upper extremity, which combine for an 11 percent whole person impairment.

Dr. Brown testified the *Guides* is not a complete treatise and that epicondylitis is not addressed by the *Guides*. Accordingly, the doctor went outside the *Guides* to rate claimant's bilateral epicondylitis, which was confirmed by clinical evidence.

The Board is persuaded by Dr. Brown's opinions as he was selected by Judge Klein to provide an unbiased opinion. Accordingly, the Board finds claimant has sustained an 11 percent whole person functional impairment due to the multiple overuse syndromes she sustained working for respondent through June 25, 2004.

2. What is the extent of claimant's disability?

The evidence establishes that claimant sustained simultaneous parallel upper extremity injuries. Consequently, claimant's permanent disability benefits are governed by K.S.A. 44-510e, which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*[3] and *Copeland*.[4] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered.

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[3] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[4] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual wages when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages. . . .[5]

And the Kansas Court of Appeals in *Watson*[6] held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the capacity to earn wages.

> In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.[7]

If a worker is required to make a good faith effort to find appropriate employment following an injury, it would seem the same rule would apply to workers who continue to be employed despite their injuries. Consequently, an injured worker is also required to make a good faith effort to retain his or her employment. And in this case, claimant has failed to satisfy that burden. As indicated above, claimant opted for layoff before her last nerve studies and before Dr. Johnson had made his final assessment of her condition. After seeing Dr. Johnson on approximately May 12, 2004, claimant did not return to the doctor to discuss the alleged problems she was encountering at work. Indeed, Dr. Johnson's records indicate claimant reported she thought she would be laid off.

Claimant also testified that she told a supervisor that she was having additional problems but the supervisor did not do anything. The record does not establish the identity of that supervisor, whether claimant requested any additional medical treatment, or whether claimant requested any type of job change or accommodation. Dr. Johnson's records do not reflect that claimant contacted his office after their May 12, 2004, visit. In

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[5] *Id.* at 320.

[6] *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

[7] *Id.* at Syl. ¶ 4.

short, the record is rather nebulous regarding what action, if any, claimant took to retain her employment.

In summary, the Board concludes that claimant failed to prove she made a good faith effort to retain her employment with respondent. Ms. Heimberger testified that respondent could have accommodated the restrictions recommended by Dr. Brown, which were:

> [S]he should permanently avoid frequent use of the left hand above shoulder level and frequent reach away from the body more than eighteen inches. No lifting should be done above shoulder level with the left hand. She should also avoid work that involved frequent flexion and extension of the wrists and elbows more than 30 degrees and frequent grasp type activities such as is necessary in operation of scissors, pliers, and similar hand tools. She should also avoid frequent use of vibrating hand tools.[8]

Although during her deposition Ms. Heimberger could not identify a specific job that would accommodate Dr. Brown's restrictions, she was confident claimant could be accommodated in either the switches or solenoid departments. According to Ms. Heimberger, respondent believes in accommodating its workers' injuries and, in fact, has accommodated other workers who have had restrictions similar to those recommended by Dr. Brown.

As claimant has failed to prove she made a good faith effort to retain her employment, the Board must impute the average weekly wage that claimant was earning working for respondent. Consequently, claimant has failed to show a wage loss greater than 10 percent and, therefore, her permanent partial general disability is limited to her 11 percent whole person functional impairment rating.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[9] Accordingly, the findings and conclusions set forth above reflect the majority's decision and not necessarily any individual member's analysis of the law or facts. And the signatures below confirm this decision is that of the majority.

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[8] Brown Depo. at 19, 20.

[9] K.S.A. 2005 Supp. 44-555c(k).

AWARD

WHEREFORE, the Board modifies the August 21, 2006, Award entered by Judge Appling and reduces claimant's permanent partial general disability to 11 percent.

Barbara Solis is granted compensation from Standard Motor Products and its insurance carrier for a series of repetitive traumas to her upper extremities through June 25, 2004, and the resulting disability. Based upon an average weekly wage of $622.07, Ms. Solis is entitled to receive 45.65 weeks of permanent partial general disability benefits at $414.73 per week, or $18,932.42, for an 11 percent permanent partial general disability, making a total award of $18,932.42, which is all due and owing less any amounts previously paid.

The record does not contain a written fee agreement between claimant and her attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of December, 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: William L. Phalen, Attorney for Claimant
Brian R. Collignon, Attorney for Respondent and its Insurance Carrier
Thomas Klein, Administrative Law Judge
Marvin Appling, Special Administrative Law Judge